

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Breyal S.,

Claimant,

vs.

KERN REGIONAL CENTER,

Service Agency.

OAH No. 2011090419

DECISION

Administrative Law Judge (ALJ) Nancy Beezy Micon, State of California, Office of Administrative Hearings, heard this matter on October 25, 2011 at the Kern Regional Center in Bakersfield, California.

Jeffrey F. Popkin, Associate Director, Kern Regional Center (KRC, Regional Center or Service Agency), represented Service Agency.

Sharon H., Claimant's custodial grandmother, represented Breyal S. (Claimant).¹

Oral and documentary evidence was received. The record was held open to and including November 15, 2011, for Claimant to submit additional documentary evidence, and for KRC to serve and file a response to those documents. The documents were timely submitted. A letter and fax cover sheet, dated November 4, 2011, from Sharon H., attaching a letter, dated November 2, 2011, from Penelope S. Suter, OD, was marked as Claimant's Exhibit A for identification. KRC's response to Exhibit A, a letter dated November 8, 2011, from Jeffrey F. Popkin, attaching an abstract from the U.S. Library of Medicine National Institutes of Health, was timely received and marked as Exhibit 15. Exhibits A and 15 are admitted.

¹ Initials for Claimant's and her relatives' surnames have been used to protect the privacy of Claimant and her family.

The matter was submitted for decision on November 15, 2011.

ISSUES

The parties agreed that the following issues are to be resolved:

1. Should KRC be required to conduct an additional assessment concerning Claimant's eligibility for services from KRC?
2. Is Claimant eligible to receive Regional Center services within the meaning of the Lanterman Developmental Disabilities Services Act, Welfare and Institutions Code section 4500 et seq. (Lanterman Act), due to a condition closely related to mental retardation or which requires treatment similar to that required for individuals with mental retardation?

FACTUAL FINDINGS

1. Claimant is a 22-year-old female. Claimant was born prematurely at approximately 26 weeks of age; she weighed two pounds at birth and was very small. Claimant was reported to have delays in reaching her developmental milestones. Before age three, Claimant received services from KRC as a participant in an "Early Start" program.² No evidence was presented concerning the services received by Claimant under the Early Start program. For reasons not disclosed by the evidence, Claimant did not continue to receive services from KRC after reaching age three, when Early Start services end. There was no evidence presented that Claimant was denied services. Claimant's mother provided testimony to the effect that she did not pursue receiving services from KRC for Claimant because she did not want her daughter to be categorized as a "mentally retarded" person. Claimant's mother inferred that Regional Center, at the time her daughter completed the Early Start program, found Claimant to be qualified for continued services as a person with mental retardation.
2. On a date not disclosed by the evidence, Claimant was found eligible to receive Social Security Income (SSI) benefits from the Social Security Administration. The Social Security Administration determined that Claimant was a person with mental retardation. There was no evidence presented to show what criteria or standards are required by the Social Security Administration to make this

² "Early Start" is the name used in California to refer to a federal program for young children at risk for certain disabilities.

determination. Nor was evidence presented to establish why Claimant qualified for this designation.

3. Claimant graduated from high school in May, 2008. As of the date of hearing, Claimant had never obtained a job. KRC does not dispute that Kimball Hawkins, Ph.D., who conducted a psychological evaluation of Claimant for KRC on January 26, 2010, recommended that Claimant receive independent living skills (ILS) training and transition related counseling.

4. Claimant's family would like Claimant to attend an ILS program at Taft Community College (Taft). KRC was instrumental in developing the ILS program at Taft, which is attended primarily by its consumers who are on the high end of the autism spectrum and by its consumers with borderline or moderate mental retardation. The participants in the ILS program at Taft reside in a set of dormitories at Taft that have been earmarked for ILS program participants. The ILS program at Taft is considered a model for post-secondary education and treatment for persons with developmental disabilities.

5. On a date not disclosed by the evidence, in approximately 2010, Claimant's grandmother contacted KRC to express interest in having Claimant participate in the ILS program at Taft. KRC referred Claimant to Dr. Hawkins, who conducted a psychological evaluation of Claimant to determine Claimant's level of intellectual and adaptive functioning. Based on the results of KRC's diagnostic evaluation of Claimant, KRC determined that Claimant was not eligible for services. Claimant then asked for a re-assessment.

6. In a letter and Notice of Proposed Action, dated August 19, 2011, Service Agency denied Claimant's request for an additional diagnostic evaluation.

7. A Fair Hearing Request was submitted on September 8, 2011. The reason provided for requesting the hearing was stated, as follows: "We feel the results of tests performed that made Breyal ineligible for services were inaccurate." Claimant requests an additional diagnostic evaluation, without family members being present, or, in the alternative, that Claimant be found eligible to receive services. Claimant contends she is eligible because she suffers from a condition closely related to mental retardation or which requires treatment similar to the treatment required for individuals with mental retardation. (This is also known as the "fifth category" of eligibility.)

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RECORDS IN EVIDENCE PERTAINING TO CLAIMANT **BEFORE** AGE 18

March 10, 2005 Triennial Evaluation and Data Review Report

8. On or about March 10, 2005, Claimant's school district conducted a triennial evaluation and data review report (2005 report) to determine whether Claimant continued to be eligible for special education services and supports due to a visual impairment. (Exhibit 14.) At the time of the evaluation, Claimant was age 15 and in grade nine at her local high school. The review was conducted by school psychologist Drina Fried, Ed.D. and school psychology intern John Barge. The 2005 report notes that Claimant was first found eligible for special education services on November 26, 1996, when Claimant was age six. The 2005 report references the following "previously qualifying data" concerning testing that was administered to Claimant:

WAIS-III

A. Data from cognitive testing given to Claimant on February 28, 2001, when Claimant was age 11, note testing results from the Wechsler Intelligence Scale for Children – Third Edition (WAIS-III). Claimant obtained the following scores on the WAIS-III: 79 verbal scale, 71 performance scale, and 73 full scale. Claimant was found at age 11 to be "[w]ell below average" in her estimated cognitive abilities. The WAIS-III testing results indicate that Claimant's intelligence quotient (IQ) at age 11 was in the range of a person with a mental retardation diagnosis.

WJ-RACH

B. The 2005 report states that subtests and broad composites in the area of "achievement" show that Claimant fell "within the Below Average to Well Below Average range" in the "achievement" category at age 11.

PSYCHOLOGICAL PROCESSING

C. On psychological processing, testing found that Claimant had visual perceptual and visual-motor deficits at age 11. The 2005 report reflects that on September 14, 2004, at age 14, Claimant had adequate low vision when wearing glasses but had difficulty tracking because her eyes did not converge. Claimant was found to lack depth perception and had poor spatial skills. In 2005, Claimant was seen two times per week for articulation speech therapy.

SOCIAL/EMOTIONAL

D. The 2005 report notes that in the area identified as "social/emotional," Claimant was given a Social Skills Rating System (SSRS) test to obtain a picture of her social behaviors on February 28, 2001, at age 11. The SSRS

test contained ratings by both Claimant's teacher and her parent. From the teacher component of the testing, Claimant obtained the following scores: 85 social skills scale (fewer skills than average); 112 problem behavior scale (average); and 74 academic competence scale (below average range). From the parent report, Claimant obtained the following scores: 99 social skills and 110 in problem behavior scale (average).

ADAPTIVE/BEHAVIOR

E. The 2005 report indicates that in the area of "adaptive/behavior," Claimant was given the Adaptive Behavior Evaluation Scale, Revised (ABES-R) on February 28, 2001, at age 11. The ABES-R is an adaptive behavior evaluation scale measuring the following adaptive skills areas: communication skills, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work skills. Claimant obtained a scaled score of 68 on the ABES-R, which placed Claimant in the second percentile, indicating a severe delay in Claimant's adaptive skills at age 11.

OTHER (SPECIFY)

F. The 2005 report, in a column labeled "Other (Specify)," contains the following summary from the Kern High School District individualized education program (IEP) for Claimant on October 14, 2004, when Claimant was age 14: "Breyal's eyes do not converge and she has difficulty tracking. As a result, she lacks depth perception and three dimensional vision. Her spatial skills are poor. She has difficulty comparing and contrasting information, and, consequently, has significant problems with interpretation and comprehension." It then states: "Please see Standard School District Multi-Disciplinary Assessment Summary (2-28-01) for developmental history." The 2001 testing and assessment summary for Claimant's developmental history was not included in the evidence at hearing.

9. Under the heading "Current Academic Performance Data," the 2005 report shows that Claimant, at age 15, was performing at grade equivalent levels of 4.1 in mathematics applications, 4.6 in reading decoding, 5.2 in spelling, 6.1 in reading comprehension, and 5.2 in mathematics computation.

November 8, 2007 Triennial Evaluation by Kern High School District

10. On or about November 8, 2007, Claimant's high school district conducted a three year review of Claimant's IEP to address Claimant's transition plan upon leaving high school. At the time of this evaluation, Claimant was age 18 and expected to graduate from high school at the end of the school year in May 2008.

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11. Claimant's 2007 triennial evaluation was completed by school psychologist Mark D. Schweer. He wrote:

Available records indicate that Breyal was initially determined eligible for Special Education services on 11/26/96 (1st grade) due to overall developmental delays. Standard School District triennial report of 02/28/01 noted that Breyal was born three months prematurely, and remained in the hospital for over three months due to respiratory, cardiac, and feeding concerns. Her developmental milestones were quite delayed. Breyal underwent eye surgeries in 8/95 and 3/96 to correct strabismus. Penelope S. Suter, OD report of 05/19/06 notes that Breyal has a "mild amblyopia with her right eye, and good visual acuity with her left with her glasses on[.]" She has variable anomalous correspondence, i.e. "her brain believes that she is pointing the two eyes in the same direction when she is not. Breyal does not have 3D vision. She may have difficulty copying from the board or overhead." Breyal's disability category has historically been noted as Visually Impaired [VI]. Her most recent triennial evaluation by the KHSD of 03/10/05 recommended continued eligibility under the VI category.

(Emphasis added; Exhibit 13, page 2 of 16.)

12. The 2007 IEP notes that Claimant had passed her classes, including the algebra requirement, and was on track for graduation. Regional Center pointed out that Claimant passed the required testing for high school graduation. Claimant's family members clarified that the testing given to Claimant was modified due to her special education needs, and that Claimant obtained special preparation instruction and supports to prepare for the testing. The family's assertion is supported by the notations concerning Claimant's present level of performance. The 2007 IEP shows that Claimant's performance ranged between a fourth grade level in the category of letter-word identification in reading, and a ninth grade level in the category of passage comprehension in reading. Claimant performed between a fifth and sixth grade level in mathematics and writing. Claimant was found to be performing in the below to average range in reading, and below average ranges in mathematics and writing. Claimant's family members credibly asserted that Claimant was given substantial supports and assistance in order to pass the mathematics testing required for graduation.

13. The 2007 IEP contains a section evaluating the "community/life adjustment" of the student with sub-categories in "independent living skills,"

“social/personal,” and “motor” skills. The narrative section under “independent living skills” states that Claimant is able to perform daily living skills appropriate to her age. Under the “social/personal” sub-category, the narrative states that Claimant has no history of behavior issues at school. The “motor” sub-category notes that Claimant had completed her physical education credits.

14. Claimant’s transition plan included the goal of identifying local junior colleges. The suggested strategy for Claimant was that she “take B.C. placement exam, contact college di[s]abled student services center and share IEP information, list required needs/accommo[d]ations and meet with a college counselor to choose classes.” The transition plan notes that Claimant’s daily living skills related to personal care and well-being were age appropriate. It also notes that “no outside agencies involved.”³ (Exhibit 13.)

November 2, 2011 Letter from Penelope S. Suter, OD

15. Claimant submitted a letter, dated November 2, 2011, from Penelope S. Suter, OD, a doctor who treated Claimant between 1996 and 2005 for Claimant’s vision difficulties. Dr. Suter explained that Claimant suffers from a condition called anomalous correspondence because her brain does not understand how to correctly match the images from her eyes. Claimant’s grandmother believes this condition is closely related to mental retardation. KRC presented an abstract from the U.S. National Library of Medicine, National Institute of Health, showing that anomalous correspondence is a neurological disorder.

RECORDS PERTAINING TO CLAIMANT AFTER SHE REACHED AGE 18

Medical Evaluation by Kern Regional Center dated January 26, 2010

16. Claimant was interviewed and observed by Arnold Chun, M.D., M.P.H., a medical consultant for KRC, on January 26, 2010, when Claimant was age 20. Dr. Chun obtained a history from Claimant and Claimant’s grandmother, who accompanied Claimant. Dr. Chun noted that Claimant “was fully ambulatory and answered questions independently and had good functional use of her upper limbs.

17. Dr. Chun provided two diagnostic impressions: (1) a learning disorder needed to be ruled out; and (2) Claimant did not have cerebral palsy or epilepsy. Dr. Chun recommended that Claimant may need to have her eligibility determined by the clinical team. He found that, in the event Claimant was found eligible, she would be able to participate in any work program that interested her because it did not appear that Claimant had any significant limitations or restrictions. Finally, Dr. Chun

³ This notation did not indicate that no outside agencies were needed. It simply stated that “no outside agencies [were] involved.”

recommended that KRC attempt to acquire Claimant's medical records for review and inclusion on her chart, including Claimant's birth records. There was no evidence in the record that KRC obtained Claimant's medical records.

January 26, 2010 Psychological Evaluation by Kimball Hawkins, Ph.D.

18. KRC referred Claimant to Kimball Hawkins, Ph.D., for a psychological evaluation of intellectual and adaptive functioning, which Dr. Hawkins performed on January 26, 2010. Dr. Hawkins administered a clinical interview, the Wechsler Adult Intelligence Scale – IV, the Wide Range Achievement Test – Revision IV, the Bender Gestalt II, and the Vineland Adaptive Behavior Scale – II. Dr. Hawkins did not review any records. Claimant was age 20 at the time of Dr. Hawkins' psychological assessment.

19. Dr. Hawkins provided the following summary concerning the test results:

Today's testing shows [Claimant] receiving scores in the low average range in verbal comprehension and processing speed with perceptual reasoning and working memory falling in the borderline deficit range. She has academic achievement at a fourth grade level in word reading and in math computation. Her visual motor integration skills are considered to be very poor. Her adaptive behaviors fall in the low average range in communication and social skills but in the borderline deficit range in social skills based on her grandmother's report.

(Exhibit 12.)

20. On the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV) administered by Dr. Hawkins to assess Claimant's cognition, Claimant obtained the following scores: 87 verbal comprehension, 71 perceptual reasoning, 77 working memory, 89 processing speed, and 77 full scale IQ. The verbal comprehension and processing speed scores fell in the low average range and the perceptual reasoning and working memory scores fell in the borderline deficit range. Dr. Hawkins wrote: "There was no evidence of mental retardation but [Claimant] does have some significant learning deficits which would have to be taken into consideration on any work program or training program."

21. The results of the Wide Range Achievement Test – Revision IV, showed that Claimant's word reading and math computation skills were at the fourth grade level. On the Bender Gestalt II test, Claimant received extremely low scores.

Dr. Hawkins wrote that Claimant “could not copy complex designs and she made significant errors on simple designs because of her visual processing problems.”

22. Claimant scored in the low average range in the area of communication and daily living skills and in the borderline deficit range in the area of social skills when Dr. Hawkins administered the Vineland Adaptive Behavior Scales II.

23. Dr. Hawkins diagnosed Claimant, as follows:

Axis I:	315.9	Learning disorder
Axis II:	V71.09	No diagnosis
Axis III:		Visual impairment

24. Dr. Hawkins recommended to KRC that Claimant be considered not eligible for Regional Center services because she does not have mental retardation, autism, “or any other Regional Center eligible condition.” Dr. Hawkins did not analyze, in her report, whether Claimant had a condition closely related to mental retardation or that required treatment similar to the treatment given to individuals with mental retardation. Dr. Hawkins considered Claimant to be a candidate for services from the Department of Rehabilitation. Dr. Hawkins recommended that Claimant receive independent living skills training and transition related counseling.

25. Based on the results of Dr. Hawkins’ psychological evaluation, KRC found Claimant was not eligible for services from the Regional Center.

26. Claimant asserts that the testing results obtained by Dr. Hawkins were skewed upward because Sharon H., Claimant’s grandmother, was permitted to be in the room when the testing took place. Sharon H. convincingly testified that Claimant would look to her for cues and that she provided encouragement to Claimant when Claimant was answering the testing questions. Claimant therefore asserts that an additional assessment should take place where Claimant is required to answer questions on her own. Claimant argues that when testing was conducted of Claimant by the social security administration, Claimant completed the testing on her own and was determined under those testing conditions to have mental retardation.

27. None of the evaluators involved in the evaluations and assessments noted in the factual findings, above, testified at the hearing.

28. Further assessment of Claimant is not found to be necessary. The relevant inquiry in this determination is Claimant’s condition before age 18. Relevant cognitive testing was already performed when Claimant was below age 18. The testing conducted by Claimant’s school district, when Claimant was age 11, evaluated in conjunction with school records and current testing results, supports the conclusion, discussed in the legal conclusions below, that Claimant is eligible for Regional Center services.

RELEVANT WITNESS TESTIMONY AND OTHER EVIDENCE

The DSM-IV-TR

29. The diagnostic criteria set out in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) is the standard criteria with which to diagnose cognitive and mental disorders.⁴ To analyze whether Claimant has a condition closely related to mental retardation, the ALJ relied on the definition of mental retardation contained in the DSM-IV-TR. In this ALJ's experience, virtually all psychologists in proceedings involving service agency eligibility (on the basis of mental retardation or the fifth category) have relied on the current version of the DSM-IV-TR to set forth the professionally accepted definition of mental retardation. Therefore, while neither party submitted a definition of mental retardation or of the fifth category, the ALJ considered the following definition of mental retardation to then assess a condition closely related to mental retardation in this matter:

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety The onset must occur before age 18 years General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.

30. In describing mild mental retardation, the DSM-IV-TR, states, in part, "As a group, people with this level of Mental Retardation, typically develop social and communication skills during the preschool years (ages 0-5 years), have minimal impairment in sensorimotor areas, and often are not distinguishable from children without Mental Retardation until a later age. By their late teens, they can acquire academic skills up to approximately the sixth-grade level. During their adult years, they usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance, especially when under unusual

⁴ The DSM-IV-TR, published by the American Psychiatric Association, is a widely accepted manual, and the ALJ takes official notice of its provisions for purposes of determining this case.

social or economic stress. With appropriate supports, individuals with Mild Mental Retardation can usually live successfully in the community, either independently or in supervised settings.”

Claimant's Witnesses

31. Claimant's mother, grandmother, aunt, and great-grandmother testified at the hearing on behalf of Claimant. They each described the functional limitations Claimant has experienced during her life.

32. Bee F., Claimant's great grandmother, has a Masters Degree in education, counseling, special education and teaching. She has worked closely with Claimant throughout her life to help her function at school and at home. According to Bee F., Claimant's intelligence is impaired. Bee F. explained that Claimant needs repetition and that basic tasks need to be broken down in order for Claimant to learn them. Bee F. described that Claimant is constantly led by those around her and in need of help in handling herself on a daily basis. Claimant has difficulty in transitioning between environments and tasks. Her thinking is very basic. She is unable to direct herself. She is unable to manage her own finances. In cross-examination, Claimant's relatives made reference to Claimant's health problems at birth; they noted that Claimant needed oxygen when she was young.⁵ Claimant, according to her relatives, cannot function in daily life or in school without the extensive support and help she has received. Claimant's mother described the extensive assistance Claimant has been given throughout her schooling. Claimant is unable to work independently. She needs to learn to ride a bus, cook, take care of her own finances, and function as an adult. In describing Claimant's impaired thinking,

⁵ Although Dr. Chun recommended that KRC attempt to acquire Claimant's medical and birth records, the record at hearing lacked evidence concerning Claimant's early medical condition. However, it should be noted that a recent appellate court decision, *Samantha C. v. State Department of Developmental Services* (2010) 185 Cal.App.4th 1462, addresses eligibility under the fifth category. In the *Samantha C.* case, fifth category eligibility was established even though the claimant, Samantha C., scored in the average range on cognitive testing. In *Samantha C.*, the appellate court found the trial court had erred in finding that Samantha C. did not meet the second basis for fifth category eligibility. The Court found: “The evidence was overwhelming that Samantha had a disabling condition. Samantha's mother testified that at the time of Samantha's birth, doctors told her that Samantha had been deprived of oxygen for about 30 minutes and that such deprivation can cause some brain damage and eyesight problems. . . . The only reasonable inference on the record is that Samantha suffered birth injuries which affected her brain and that her cognitive disabilities and adaptive functioning deficits stem, wholly or in part, from such birth injuries. Samantha thus has a ‘disabling condition’ within the meaning of the fifth category.” (*Id.* at 1492-93.)

Claimant's aunt gave the example of Claimant wanting to help vacuum and going to the vacuum but not understanding that the vacuum needed to be plugged in.

LEGAL CONCLUSIONS

1. Cause exists to grant Claimant's appeal, as set forth in factual finding numbers 1 through 32, and legal conclusion numbers 2 through 17.

2. Welfare and Institutions Code section 4512 states:

(a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. California Code of Regulations, title 17, section 54000, states in pertinent part:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

4. California Code of Regulations, title 17, section 54001, states in pertinent part:

(a) “Substantial disability” means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents . . . educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

5. California Code of Regulations, title 17, section 54002 states, “[c]ognitive’ as used in this chapter means the ability of an individual to solve problems with insight, to adapt to new situations, to think abstractly and to profit from experience.”

6. Whereas the first four categories of eligibility are very specific, the disabling conditions under the residual, fifth category, are intentionally broad to encompass unspecified conditions and disorders. However, this broad language is not intended to be a catchall, requiring unlimited access for all persons with some form of learning or behavioral disability. There are many persons with sub-average functioning and impaired adaptive behavior; under the Lanterman Act, the Service Agency does not have a duty to serve all of them. The fifth category does not provide unlimited access to all persons with some form of learning, physical, or behavioral disability.

7. While the Legislature did not specifically define the fifth category, it did require that the qualifying condition be “closely related” (Welf. & Inst. Code, § 4512) or “similar” (Cal. Code. Regs., tit. 17, § 54000) to mental retardation or “require treatment similar to that required for mentally retarded individuals.” (Welf. & Inst. Code, § 4512.) The definitive characteristics of mental retardation include a significant degree of cognitive and adaptive deficits. Thus, to be “closely related” or “similar” to mental retardation, there must be a manifestation of cognitive and adaptive deficits which render that individual’s disability like that of a person with mental retardation. However, this does not require strict replication of all of the cognitive and adaptive criteria typically utilized when establishing eligibility due to mental retardation (e.g., reliance on I.Q. scores). If this were so, the fifth category would be redundant. Eligibility under this category requires an analysis of the quality of a claimant’s cognitive and adaptive functioning and a determination of whether the effect on his or her performance renders the individual like a person with mental retardation. Furthermore, determining whether a claimant’s condition “requires treatment similar to that required for mentally retarded individuals” is not a simple exercise of enumerating the services provided and finding that a claimant would benefit from them. Many people could benefit from the types of services offered by regional centers (e.g., counseling, vocational training or independent living skills training). The criterion is not whether someone would benefit. Rather, it is whether someone’s condition requires such treatment.

8. As Claimant seeks eligibility, she bears the burden of proof by a preponderance of the evidence. (Evid. Code, §§ 500, 115.) Claimant met her burden.

9. Claimant’s evidence, and in particular the testimony of Claimant’s relatives was persuasive when considered in conjunction with the Service Agency’s evidence. The findings in the evaluation provided by Dr. Hawkins are, however, discounted because Claimant was tested with cuing and encouragement from her grandmother, who was present during the testing. Also, Dr. Hawkins did not have the

benefit of reviewing Claimant's previous testing results and Claimant's early medical records. Dr. Hawkins reached her conclusions based solely on the single assessment of Claimant at age 20 while Claimant's grandmother was present to provide support. The testimony of Claimant's relatives and the evidence, when viewed in totality, supports a conclusion that Claimant meets the fifth category definition and the other statutory and regulatory requirements for regional center eligibility.

10. Considering the five-point margin of error, as discussed in the DSM-IV-TR, the 73 full-scale IQ score of Claimant at age 11 can qualify Claimant, when viewed with the severe delay shown in adaptive skills testing on the ABES-R at age 11, as an individual with mental retardation. It is noted that the DSM-IV-TR describes individuals with mild mental retardation as a group that may, by their late teens, acquire academic skills up to approximately the sixth-grade level. During their adult years, people with mild mental retardation usually achieve social and vocational skills adequate for minimum self-support, but may need supervision, guidance, and assistance. Claimant need not mirror the description for mild mental retardation, as set forth in the DSM-IV-TR, as she does not argue that she has mental retardation. Nevertheless, it is striking that Claimant appears to fit the description of a person with mild mental retardation.

11. Claimant's evidence proved that she has a condition closely related to mental retardation. The 77 full-scale IQ score obtained by Dr. Hawkins is only two points above a 75 IQ, the ceiling of a possible score in the mental retardation range. That two-point difference, when viewed together with Claimant's school records indicating that Claimant had overall developmental delays, and the various school records that found Claimant was performing at the fourth to sixth grade levels, the social security finding that Claimant has mental retardation, the anecdotal evidence from Claimant's relatives, and Dr. Hawkins' conclusion that Claimant's academic achievement was at a fourth grade level in reading and in math computation, support a conclusion that Claimant's general intellectual functioning is delayed. The IQ score obtained by Dr. Hawkins is only four points above the full scale IQ score of 73 that Claimant received when she was age 11.

12. Claimant's relatives testified that she requires repetition to learn and that Claimant is unable to complete tasks without assistance and prompting due to her cognitive impairments. According to Claimant's relatives, she has difficulty transitioning between environments and tasks. She requires assistance on the tasks of daily living. She is unable to direct herself. Claimant has never been able to work. Claimant's relatives' descriptions of Claimant and her needs established that Claimant has a limited ability to solve problems with insight, adapt to new situations, and think abstractly. Claimant, according to her school records, would need to contact college disabled student services center and seek accommodations for her needs in order to attend college.

13. Claimant's school records show that Claimant has consistently performed between the fourth and sixth grade level in school. This was true even when Claimant was evaluated at age 18 and when Dr. Hawkins assessed Claimant's academic achievement levels at age 20. Claimant demonstrated delays in cognitive, social skills, and adaptive behavior. These delays are global.

14. Claimant's overall adaptive functioning is significantly delayed. Claimant's impairments exist in four of the regulatory categories that establish a substantial disability (learning, self-direction, capacity for independent living, and economic self-sufficiency). (Cal. Code Regs., tit. 17, § 54001.) Claimant therefore meets the substantial disability requirement. (*Ibid.*)

15. The preponderance of the evidence established that Claimant's impaired cognition together with her impaired adaptive skills constitute a condition closely related to mental retardation and that she is substantially disabled by that condition. (Welf. & Inst. Code, § 4512, subd. (a); Cal. Code Regs., tit. 17, § 54001.) Claimant meets the fifth category of eligibility.

16. Evidence was lacking on what treatment is required by individuals with mental retardation. However, KRC advised that the program at Taft provides ILS training and is attended primarily by KRC consumers on the high end of the autism spectrum, or with borderline or moderate mental retardation. The ILS training at Taft thus appears to be a treatment required by individuals with borderline or moderate mental retardation. Dr. Hawkins recommended that Claimant receive independent living skills training and transition related counseling. Therefore, and when further considering Claimant's school records and her relatives' overall descriptions of Claimant's learning deficits, it appears that Claimant requires treatment similar to the treatment required by persons with mental retardation. (Welf. & Inst. Code, § 4512, subd. (a).) Claimant appears to also meet the fifth category of eligibility under this second prong of eligibility.

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17. Despite the accommodations and supports Claimant has received from her family and school district, she has not shown much progress beyond, generally, the fourth to sixth grade level of academic achievement. Her full-scale IQ scores have also over time consistently been in the borderline range for mental retardation. This indicates that Claimant's condition has existed for most of her life and will likely continue into the future. Claimant's condition originated before she turned 18 and will last indefinitely.

ORDER

Claimant's appeal is granted. No further assessment of Claimant is required. Claimant has a developmental disability, as defined in Welfare and Institutions Code section 4512, subdivision (a), and is therefore eligible for services from the Service Agency.

DATED: December 22, 2011

Nancy Beezy Micon
Administrative Law Judge
Office of Administrative Hearing

NOTICE

This is the final administrative decision in this matter. Each party is bound by this decision. An appeal from the decision must be made to a court of competent jurisdiction within 90 days of receipt of the decision.